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In the Supreme Court of the United States

October Term, 1972

NO.

COLUMBIA STANDARD CORPORATION,
Petitioner

v.

RANCHERS EXPLORATION & DEVELOPMENT, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the District Court for the District of New Mexico, denying petitioner's prayer for an injunction, is set out in Appendix A, p. 11; the opinion of the Court of Appeals affirming the judgment of the District Court is set out in Appendix B, p. 13; and the order of the Court of Appeals denying petitioner's application for rehearing is set out in Appendix C, p. 21. The opinion of the Court of Appeals is reported in the advance sheet at 468 F.2d 547. The other opinion and order have not been officially reported.

JURISDICTION

The judgment of the Court of Appeals, entered on September 15, 1972, is set out in Appendix D, p. 22. A petition for rehearing was filed on September 29, 1972, and was denied on December 13, 1972. An order granting a stay of the mandate of the Court of Appeals pending application for certiorari was entered on January 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether public domain lands can be appropriated in substantial claim blocks under the Mineral Location Act of 1872 on the sole basis of geological or geophysical inferences of mineralization without disclosure of valuable minerals in place on each claim or compliance by the locator with the express discovery and discovery work requirements of state law.

2. Whether a locator that is otherwise qualified under the Mineral Location Act of 1872 is disqualified to relocate prior invalid mining claims where such locator has knowledge of the prior claims, makes no inspection of the ground to determine the interests of prior parties therein, if any, and relocates the land for the express purpose of divesting prior interests that have not been perfected in the manner required by law.

STATUTORY PROVISIONS

The Mineral Location Act of 1872, 30 U.S.C. §§ 22, 23 (Appendix E) and the discovery work statute of New Mexico, N. M. Stat. Ann. §§ 63-2-3, 63-2-3.1 (1954) (Appendix F).

STATEMENT

Petitioner Columbia Standard Corporation, a Nevada corporation, brought this action in the Federal District Court of New Mexico to enjoin respondent Ranchers Exploration & Development, Inc., a New Mexico corporation, from interfering with petitioner's location of certain mining claims on unreserved Federal public lands in Sandoval County, New Mexico. Diversity of citizenship was established, and the amount in controversy exceeded $10,000. Federal court jurisdiction was predicated upon 28 U.S.C. § 1334.

In August of 1967 respondent staked, and filed location certificates on, 123 lode mining claims extending over a substantial part of a five square mile tract (R. 74-75), and conducted exploration work on some of said claims from time to time through November of 1970 (R. 176-181). Shallow discovery holes were drilled on approximately one-half

of the claims and affidavits of discovery were recorded with respect thereto, in purported compliance with location requirements of N. M. Stat. Ann. § 63-2-3.1 (App. F, p. 24), but no mineralization was found in said holes (R. 181-182, Resp. Br. 21). Respondent also drilled deep discovery holes on approximately 70 claims, but filed no affidavits of discovery thereon, as required by said Section 63-2-3.1, and failed to establish by physical evidence the presence of mineral in place in any such hole (R. 211, 149). Radiometric probes of the deep holes showed significant radiation anomalies, suggesting possible presence of uranium mineralization, in three claims, minor radiation anomalies in 14 claims and no radiation anomalies in 58 of the holes (R. 201-207). From November of 1970 through January of 1972 defendant did no further work on the claims.

Following a geological evaluation of the claim area, an examination of county records for location certificates and discovery affidavits, or the absence thereof, and receipt of opinion of counsel that respondent's claims were invalid under Federal and state mining laws (R. 105-106), plaintiff staked and posted 157 claims in substantial conflict with respondent's claims (R. 11, 211). On January 29, 1972, plaintiff commenced drilling discovery holes for the perfection of these claims in the manner required by N. M. Stat. Ann. § 63-2-3.1. At the time its locations were initiated, petitioner, through its employee, Carlson, knew of respondent's interest in the area since 1967, the existence of respondent's locations, and that respondent had done some drilling in 1967 and 1968 (R. 95-103). Neither plaintiff nor its geologist were shown to have knowledge of the results of any exploratory work of respondent or to have seen any confidential or proprietary information. Respondent had not been in possession of the land for over twelve months prior to petitioner's entry (R. 178-181).

On January 30, 1972, a representative of respondent demanded that petitioner cease operations by reason of respondent's prior claims and threatened impoundment of the drilling rigs if work were continued. Petitioner ceased

operations and, on February 1, 1972, commenced this action. On February 29, 1972, the district court entered a Memorandum Opinion and Order holding the land not to be open to location and not in all events to be locatable by one whose entry had not been made in good faith as that term is used in mining law. (App. A, p. 11) On appeal to the Court of Appeals petitioner prayed for reversal on the grounds that: (i) neither the findings of the court nor the evidence in the record would support, as a matter of law, the court's conclusion that the land had been appropriated by respondent's locations and was not open to location at the time of petitioner's entry; and (ii) the findings of the court that characterized petitioner's entry as surreptitious and not in good faith did not support, as a matter of law, the court's conclusion that plaintiff's relocations were ineffective against even invalid prior locations. The Court of Appeals affirmed the decision of the trial court (App. B, p. 13).

REASONS FOR ALLOWING THE WRIT

This case involves basic and recurring questions of Federal law regarding the legal prerequisites for appropriation of public domain lands to private use under the Mineral Location Act of 1872. This Court has heretofore recognized the importance of these questions in *United States* v. *Coleman*, 390 U.S. 599 (1968), because of the multiple demands which the nation imposes upon its public lands; the statutory policy that these lands be subject to appropriation, in order to stimulate needed development of mineral resources; and the concern that no private party be permitted to appropriate such lands to his own use, for speculative or other purposes, without establishing the presence of a valuable mineral in place.

In essence the Court of Appeals held that a locator may appropriate the public lands by discoveries consisting solely of geological and geophysical inferences; that such discoveries on a small fraction of the lands claimed give the locator rights in all such lands; and that the sufficiency of such discoveries may not be challenged by a subsequent locator who knew of the prior claims, but did not make a

claim-by-claim investigation on the ground or inquire as to the current status of the prior locator's work. As more fully set out hereafter, this decision is inconsistent with Federal statutes, the thrust of decisions by this Court, the interpretation of governing state law by the Supreme Court of New Mexico and the position of the Ninth Circuit. If followed, it would encourage parties to appropriate the public domain to private use without establishing the presence of a valuable mineral in place and would limit challenges to spurious or insufficient mining claims.

1. *The decision of the Court of Appeals permits public lands to be appropriated under the mining laws without discovery of mineral in place, contrary to the requirements of Federal and New Mexico law.*

The decision of the Court of Appeals is inconsistent with the requirements of Federal statutes and the thrust of decisions by this Court. There is no permissible substitute for discovery under Federal law. 30 U.S.C. § 23. In order to perfect a lode location, a miner must discover a vein or lode of rock in place, bearing valuable mineral. *Cole* v. *Ralph*, 252 U.S. 286 (1919). It is not enough that there may be indications of the presence of a valuable mineral. The discovery must give "reasonable evidence of the fact . . . that there is a vein or lode carrying the precious mineral . . . ." It must be sufficient to justify "a prudent person in the expenditure of money and labor in exploitation [of the valuable mineral]." *Chrisman* v. *Miller*, 197 U.S. 313 (1905). Radiometric testing and inferences drawn from the geologic character of the region establish neither the presence of a vein or lode of uranium nor that a man of ordinary prudence would be justified in the expenditure of time and money to develop the property.

The decision of the Court of Appeals is inconsistent with governing state law, as interpreted by the Supreme Court of New Mexico, and therefore contravenes the rule of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). *Adams v. Benedict*, 64 N.M. 234, 327 P.2d 308 (1958), a case presented to the Court of Appeals but not discussed in its opinion, held

that where the prior locator has not disclosed valuable mineral in discovery shafts, he has not perfected his location and it is invalid against intervening rights. This case further held that failure to comply with the provisions of the drill hole statute, N.M. Stat. Ann § 63-2-3.1, makes the purported location invalid as to intervening rights. Respondent's admitted failure to record drill hole affidavits is not a mere technical defect, capable of being cured by actual knowledge of subsequent locators; examination of the ground would not provide information whether a valuable mineral had been discovered in holes hundreds or thousands of feet deep.

The decision of the Court of Appeals is inconsistent with the position of the Ninth Circuit and is inconsistent with the construction given the discovery requirement by the supreme courts of several western states. The Ninth Circuit, in the context of a proceeding under the Multiple Surface Use Act of 1955, 30 U.S.C. §§ 612-13, has ruled that geological evidence of a gold-bearing formation, mined upon adjoining property and apparently continuing under the property at issue, as shown by the presence of Tertiary dikes on the surface, is insufficient for a discovery. *Henault Mining Co.* v. *Tusk*, 419 F.2d 766 (9th Cir. 1969). State supreme courts, faced with the issue of what is required for a discovery of uranium under Federal and consistent state law, consistently have required evidence of valuable mineral in place to supplement radiometric testing. Typically these cases have required physical evidence of the mineral in place, such as assays of samples. *Western Standard Uranium Co.* v. *Thurston*, 355 P.2d 377 (Wyo. S. Ct. 1960); *Globe Mining Co.* v. *Anderson*, 78 Wyo. 17, 318 P.2d 373 (1957); *Berto* v. *Wilson*, 74 Nev. 128, 324 P.2d 843 (1958); *Dallas* v. *Fitzsimmons*, 137 Colo. 196, 323 P.2d 274 (1958) (involving a claimed discovery on state land); and see *Ranchers Exploration Development Co.* v. *Anaconda Co.*, 248 Fed. Supp. 708 (D. Utah 1965); but *cf. Rummell* v. *Bailey*, 7 Utah 2d 137, 320 P.2d 653 (1958).

2. Even if the Court of Appeals correctly found that there were discoveries on some of the claims, these could not give respondent rights on the claims where it had made no discovery.

The Court of Appeals precluded plaintiff "from entering onto the disputed land even though Rancher's claims were not perfected on all of its claims." It entered this order even though respondent disclaimed any attempt to assert rights on the basis of *pedis possessio* and conceded that the claims on which radiometric testing was negative were "unperfected." In effect, then, the Court of Appeals ruled that a prior locator obtains rights to all of the claims which he asserts by virtue of having made a discovery on a small number of them. That position is wholly inconsistent with the language of 30 U.S.C. § 23, holdings of this Court and the position of the New Mexico Supreme Court. If followed, it would permit prospectors to hold large blocks of land for speculative or other purposes with no proof of the existence of valuable minerals on the bulk of the claims held and would encourage improper private appropriation of the public lands. *United States* v. *Coleman*, 390 U.S. 599 (1968).

In *Union Oil Co.* v. *Smith*, 249 U.S. 337 (1918), defendant asserted rights to the "Rawley claims" on the basis of its drilling operations and subsequent discovery of oil on the contiguous "Sampson claim". This Court held that discovery upon a particular claim is essential in order to gain rights to it and affirmed the rulings of the lower courts that defendant gained no right to the contested claim by virtue of its discovery work upon the contiguous claim. See also *Waskey* v. *Hammer*, 223 U.S. 89 (1912), holding that a discovery upon the particular claim is essential and invalidating the location which had been redrawn so as to exclude the point of discovery; and see *Cole* v. *Ralph*, 252 U.S. 286, 299 (1919), ruling that the assertion that claims may be "located and held on the principle of being contiguous to adjacent claims" is "an obviously mistaken view of the law . . . ."

In *Adams* v. *Benedict*, 64 N.M. 234, 327 P.2d 308, 311 (1958), the Supreme Court of New Mexico said:

> We believe that it is fundamental law that a discovery must be made within the boundaries of the claim in order to make the location valid. We also believe that the statutory provisions requiring a discovery pit on each individual claim is a necessity to perfect the location.

3. The Court of Appeals has erroneously conceived or enlarged a "good faith" requirement for relocation of defective mining claims, and in consequence thereof gives continuing protection to public domain appropriations which fail to comply with law.

The Court of Appeals held that petitioner could not relocate respondent's claims and challenge the sufficiency of respondent's discoveries because of "bad faith" on the part of petitioner. That decision, as a matter of law on any set of facts which the evidence might support, is inconsistent with the policies underlying the Federal mining laws, the position of the Ninth Circuit and the decisions of the Supreme Court of New Mexico.

The Circuit Court of Appeals for the Ninth Circuit has agreed that a subsequent locator may gain no rights by making a "forcible, fraudulent or clandestine entry" upon public lands which are in the actual possession of another, but held that, when the prior locator has not made a sufficient discovery and is not in actual possession, a subsequent locator may enter and assert his rights. *Duffield* v. *San Francisco Chemical Co.*, 205 Fed. 480, 486 (1913).

> The appellant finding the lode mining ground so located [as placers] had the right to regard the locations as void, and locate the ground in a lawful manner in order to present to the Land Department the question of their right to acquire the same. If the appellee's contention [that the lode claimants were trespassers, and as such could acquire no rights] is correct, there was no way in which that question could be brought on for hearing, either in the Land Department or before a court, and the wrongful possession of the land by placer claimants who were trespassers effectually barred the lawful entry of the same by lode locators. Such is not the law.

The Supreme Court of New Mexico has held explicitly that a subsequent locator's knowledge of the prior claim is no bar to entry. *Adams* v. *Benedict*, 64 N.M. 234, 327 P.2d 308, 317 (1958).

> The appellants entered peaceably. Any knowledge they had of an overall plan for development of the area is immaterial. Nor did the knowledge that the claim had been staked out prevent appellants from entering. [Citation omitted]. Even though they were told that someone else claimed the land before the entry, it did not prevent them from taking legal possession. To hold otherwise would allow a person to hold vast amounts of land by merely claiming it without doing the work required by the rules laid down above. It would encourage speculation and would not allow the orderly filing of mining claims anticipated by the law.

See also *Walsh* v. *Henry*, 38 Colo. 393, 88 P. 449 (1906), relied upon by the New Mexico Court.

Contrary to the ruling of the Court of Appeals, a subsequent locator has a duty of inquiry under New Mexico law only when he has actual knowledge which would cure a technical defect in the prior locator's recorded notice describing a claim. *Johnson* v. *Ryan*, 43 N.M. 127, 86 P.2d 1040 (1939). A general duty of inquiry could well frustrate challenges to invalid earlier locations, since the prior locator might attempt to resume possession and commence work in order to defeat the relocation, and could lead to physical conflicts among locators.

4. *The decision of the Court of Appeals encourages and protects large and speculative aggregations of land under the mining laws without exploration or development, contrary to the express requirements and policies of the mining laws and the decisions of this Court.*

Unless subject to challenge, miners may fail to develop the mineral resources on their claims, defeating the basic purpose of opening the public lands to mineral development. While Federal land management agencies may challenge the rights asserted by a locator to the public domain,

many challenges are made, and insufficient locations overturned, by private parties with an interest in developing the minerals in the lands at issue. The decision of the Court of Appeals would limit drastically this ability of private locators to contest insufficient prior claims and thereby to serve the public's interest in preventing unlawful uses of the public domain.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Columbia Standard Corporation

February 1973.

APPENDIX A

In the United States District Court

FOR THE DISTRICT OF NEW MEXICO
Civil No. 9310

COLUMBIA STANDARD CORPORATION,
A NEVADA CORPORATION,

PLAINTIFF,

VS.

RANCHERS EXPLORATION & DEVELOPMENT, INC.,
A NEW MEXICO CORPORATION,

DEFENDANT.

Decided February 29, 1972

MEMORANDUM OPINION AND ORDER

This is an action in ejectment and petition for injunctive relief brought by plaintiff against the defendant arising out of contested right to possess for mining purposes of public domain located in Sandoval County, New Mexico.

The defendant staked claims on the contested ground in the latter part of 1967. Later filing location notices, notice of discovery work and proofs of labor in the Clerk's office of Sandoval County. Deep holes were drilled on some of the claims and shallow holes were drilled on others. The deep holes were numbered with 2 x 2 stakes 30 inches long. Some of the stakes were laying on the ground, apparently having been pushed over by livestock. Some road work had been done in the area. There was evidence of mineralization on some of the claims as shown by probes placed in the deep holes and there were known valuable uranium bearing formations in the immediate vicinity of the land in contest.

The plaintiff's geologist was conversant with the area in question and regarded it as a good prospect. In 1967 or 1968 he engaged in discussions with defendant on behalf of others and at that time knew that defendant had been working in the area and made some claims to the contested land.

In late 1970 or early 1971 plaintiff's geologist at the request of plaintiff searched the records of the Clerk's office in Sandoval County and there found a variety of documents filed by defendant pertaining to the contested lands. From this search alone plaintiff determined to its satisfaction that defendant's claims were faulty and the ground was subject to restaking.

Plaintiff apparently made no effort to examine defendant's claims on the ground to determine extent of staking, possession, discovery or other badges of valid location. Plaintiff apparently made no inquiry of anyone concerning defendant's activity on the claims.

On a Saturday in late January 1971 plaintiff went to the ground in question and started staking claims. The next day drilling activity was commenced on the claims by plaintiff, which resulted in defendant's geologist appearing on the scene at which time he prevailed upon plaintiff's geologist to stop staking and drilling.

This suit resulted.

Plaintiff's entry on the property was surreptitious and as such was not made in good faith as that term is used in mining law.

Plaintiff had the burden of proving that the challenged claims of defendant were invalid or have been abandoned and that plaintiff has the right to overstake and possession of the area. It has failed in its proof in this matter.

IT IS ORDERED that the issues be found in favor of the defendant and the complaint of the plaintiff be dismissed.

E. L. Mecham

UNITED STATES DISTRICT JUDGE

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT

No. 72-1297

COLUMBIA STANDARD CORPORATION, a Nevada Corporation,

Plaintiff-Appellant.

v.

RANCHERS EXPLORATION & DEVELOPMENT, INC., a New Mexico Corporation,

Defendant-Appellee.

Appeal from United States District Court
For the District of New Mexico
(9310)

Decided December 15, 1972

Clyde O. Martz, Denver, Colorado (*W. W. Atkinson*, Albuquerque, New Mexico, and *Frank L. Robinson*, Denver, Colorado, on the brief) for Appellant.

Paull Mines, Albuquerque, New Mexico (*Marshall G. Martin*, Albuquerque, New Mexico, on the brief) for Appellee.

Before SETH, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Columbia Standard Corporation (Columbia), a Nevada corporation, brought this suit to enjoin Ranchers Exploration & Development, Inc. (Ranchers), a New Mexico corporation, from interfering with its operations for perfection of certain lode mining locations on federal public lands in Sandoval County, New Mexico. The District Court held for Ranchers.

Columbia entered the disputed land on January 26, 1972 and staked 157 lode mining claims on January 29 and 30, 1972. Prior to its entry Columbia's employees examined courthouse records and were aware of Ranchers' lode location notices, affidavits of discovery work, and affidavits of annual assessment work. Columbia concluded that Ranchers' claims were invalid and began staking claims. On January 30, 1972 Ranchers demanded that Columbia cease its operations and remove its rigs on the basis of Ranchers' superior possessory rights.

Ranchers staked mining claims over a five-section area in August of 1967 and posted and filed location notices. Affidavits of discovery work were filed on the lode claims for 69 shallow holes, alleging the discovery of shale, sandstone and other minerals in drill holes 10 to 14 feet deep and 2 to 3 inches in diameter. None of the affidavits of discovery work were filed within the 90-day period required by statute. N.M.Stat.Ann. § 63-2-3.1. From 1967 to November of 1970 Ranchers drilled about 70 deep drillholes and conducted radiometric testing on some of the staked claims. It also graded drill sites, surveyed the area, and prepared geologic maps and data. Ranchers filed proofs of labor for annual assessment work on all of its claims for 1968, 1969, 1970 and 1971.

Columbia's locating agent and geologist, Dale Carlson, knew about Ranchers' deep drilling program before locating Columbia's claims. Carlson began working in the area in dispute in 1954 or 1955. In 1967 he worked for Summit Exploration Company. Summit's claims conflicted with Rancher's claims and the two companies reached a com-

promise which Carlson sat in on. At the conference Ranchers stated that it had valid lode claims in the area. The overlapping claims between Ranchers and Summit were divided up between the two companies. Both companies were interested exclusively in exploration and development of uranium, if commercially feasible. Carlson was fully aware of this fact. No processing mill had been constructed in the area to process the uranium then, or at the date of this action.

Carlson also testified that he made a visual inspection of the area with Ray Schultz and Gale Campbell on January 1, 1972 and did not find much of anything. Campbell said they made the inspection on February 1, 1972, at which time he took some photos which were admitted into evidence. Carlson testified that Columbia began its drilling on January 1, 1972 on some of the claims previously staked and claimed by Ranchers. He also testified that on January 29th and 30th Columbia began staking over Ranchers' claims. On that weekend he noticed 26 drill holes, a few stakes, and a graded road up to the top of a mesa. Carlson's and Campbell's conflicting testimony will be discussed in relation to the trial court's finding of a "bad faith" entry on the part of Columbia. Columbia's agents did not ask Ranchers' employees about its work before Columbia located its claims. Most of Columbia's work in locating its claims was done on the weekend of January 29, 1972. Columbia was staking locations in order to find uranium. It was aware that Ranchers was interested solely in uranium. Carlson testified that it was the only valuable mineral in the area.

The trial court found generally that there was evidence of mineralization on some of the claims; that there were known valuable uranium bearing formations in the immediate vicinity of the land in contest; that Columbia searched the records in Sandoval County; and that from that search alone determined that Ranchers' claims were faulty. The trial court found that Columbia made no effort

to examine Ranchers' claims individually on the ground to determine the extent of its staking, possession, discovery or other badges of valid location, and that Columbia made no inquiry of anyone concerning Ranchers' activity on the claims. The Court found that Columbia's geologist searched the records of the Clerk's office in Sandoval County in "late 1970 or early 1971" and that Columbia started staking claims on "a Saturday in late January 1971." The dates are erroneous. The records were searched in late 1971 or early 1972 and staking begun by Columbia in late January, 1972. The trial court held that Columbia's entry on the property was surreptitious and "as such was not made in good faith." It also found that: (a) Columbia had the burden of proving that the challenged lode mining claims of Ranchers were invalid or had been abandoned; (b) Columbia had the burden of proving it had the right to overstake and take possession of the area covered by these claims; and (c) Columbia had failed in its proof.

Columbia contends that: (1) the District Court erred in holding that it had the burden of proving Ranchers' claims were invalid or had been abandoned; (2) Ranchers failed to make a discovery on any of its claims as required by federal law; (3) Ranchers' locations were not made in compliance with law; (4) Ranchers had no possessory rights to the disputed claims at the time of its entry either by location or by pedis possessio; (5) Ranchers' claims are subject to relocation for non-performance of required annual assessment work; and (6) it is not precluded from entering and locating the subject claims by reason of its knowledge of prior locations, the time and circumstances of its entry, or the source of its information that the land offered favorable prospecting opportunities.

Columbia contends that the trial court erred in finding its entry was surreptitious and not in good faith. The trial court based its conclusion on the findings that: (1) Columbia's geologist (Carlson) knew of Ranchers' work and claims on the disputed land; (2) from Columbia's search

of the records alone, it determined that Ranchers' claims were faulty and the ground subject to restaking; (3) Columbia made no real effort to examine Ranchers' claims on the ground to determine the extent of staking, possession, discovery or location prior to its entry; (4) Columbia did not ask anyone about Ranchers' activity on the claims; and (5) Columbia started staking claims on a Saturday in late January, 1971. We cannot reverse unless these findings are clearly erroneous. Fed.R.Civ.P. 52; United States v. United States Gypsum Co., 333 U.S. 364 (1948); Ryan v. Rolland, 434 F. 2d 353 (10th Cir. 1970); Wolfe v. Tri-State Insurance Company, 407 F. 2d 16 (10th Cir. 1969).

Although none of the trial court's findings would constitute bad faith by Columbia standing alone, when they are considered cumulatively they constitute sufficient evidence on which the trial court could find bad faith. The finding of bad faith was not clearly erroneous.

In order to enter on public land, the locator must make a good faith entry. Union Oil Company of California v. Smith, 249 U.S. 337 (1919); Winslow v. Burns, 47 N.M. 29, 132 P.2d 1048 (1943); Johnson v. Ryan, 43 N.M. 127, 86 P.2d 1040 (1939). Defects by the senior locator are ignored where the junior locator's entry was in bad faith. 1 American Law of Mining, § 5.67 (1971). There is an absence of good faith where the junior locator seeks possession solely on the basis of defects in the senior locator's claims. Ranchers Exploration and Development Co. v. Anaconda Company, 248 F. Supp. 708 (D. Utah 1965); Johnson v. Ryan, *supra*. While mere knowledge of a relocator that a locator claims superior rights does not constitute bad faith when the relocator enters, knowledge of a prior location places a duty upon the relocator to make inquiry to determine the extent of the adverse party's work performed in relation to exploration and development. Johnson v. Ryan, *supra*.

Carlson, Columbia's geologist, knew about Ranchers' claims to the disputed land. Therefore, Columbia was under

a duty to make actual and visual inquiry and inspection of Ranchers' lode claims and any work performed on the land. Carlson testified that a visual inspection of the property was made by himself, Ray Schultz and Gale Campbell on *January 1, 1972* to determine whether recent work had been done. The visual inspection was made to determine the extent of Ranchers' prior work in the area, including locations and nature of core holes drilled on various claims. Mr. Campbell testified that he took photos on the inspection with Carlson and Schultz on *February 1, 1972*, and that he began working for Columbia on January 2, 1972. Columbia began staking on January 29, 1972. The date of the inspection is conflicting, but in any event no inspection was made on a claim to claim basis prior to the date Columbia began staking. When Columbia began staking, Carlson testified that he noticed 26 drill holes, a few stakes and a graded road in the area. He testified that:

> "[w]e didn't particularly make an exhausting survey to try to determine whether all of their stakes were there. These are just the ones we came across in the course of locating this." (T., Vol. III, p. 71).

Columbia relied almost exclusively, then, on its examination of Ranchers' filings in the courthouse to conclude that Ranchers' locations and discoveries were defective and that the land was open to relocation. Bad faith is further evidenced by the fact that Columbia began drilling on its Win Claims 9 and 26 on which Ranchers had deep discovery holes. A thorough visual examination of those claims by Columbia would have disclosed Ranchers' previous drilling. Ranchers' Exhibit C is a map showing its drill holes, and by placing it under Exhibit D, Ranchers established its deep drill holes on the very claims Columbia began drilling on.

Carlson testified that he did not see any core holes or other indicia of discovery work on Win Claims 9 and 26 prior to Columbia's drilling. Ranchers thereafter offered

into evidence its Exhibit C. This exhibit evidences that Ranchers had drilled deep drill holes on the very claims Columbia had commenced its drilling operations on. Columbia did not offer any rebuttal. The only evidence Columbia introduced was that Carlson noticed 26 drill holes on the entire five-section area on the day Columbia began drilling. He did not testify as to the location of these holes on a claim to claim basis. Even though no affidavits of discovery work were filed by Ranchers on Columbia's Win Claims 9 and 26, Columbia overstaked the entire five sections on which Ranchers had filed discovery affidavits for 69 shallow holes on 69 claims. The trial court did not err in concluding that Columbia did not examine Ranchers' claims individually on the ground to determine the extent of staking, discovery or location prior to the time it began staking.

Columbia contends that the trial court erred in holding that it had the burden of proving that Ranchers' claims were invalid or had been abandoned. It argues that Ranchers has the burden to show that the lands were withdrawn from the public domain.

In all actions to recover possession of land one must prevail on the strength of his own title (rights) and not on the weakness of his adversary's title (rights). Kanab Uranium Corporation v. Consolidated Uranium Mines, 227 F. 2d 434 (10th Cir. 1955); Adams v. Benedict, 64 N.M. 234, 327 P.2d 308 (1958). The evidence must be viewed in favor of the prior locator. Winslow v. Burns, *supra.* If the claimant fails to show right of possession in himself, he cannot take advantage of the defects in the location of the other claimant.

Columbia sought exclusive possession of the disputed land. It failed in its burden of proving that the land was open to location. Columbia also failed to prove that it entered the disputed land in good faith.

Columbia's other contentions were not decided by the trial court and will not be considered by this court, in light of our holding that the trial court's finding that Columbia's entry was not in good faith is supported by substantial evidence. Columbia is, accordingly, precluded from entering onto the disputed land even though Ranchers' claims were not perfected on all of its claims.

AFFIRMED.

APPENDIX C

United States Court of Appeals

No. 72-1297

COLUMBIA STANDARD CORPORATION, a Nevada Corporation,
Plaintiff-Appellant,

v.

RANCHERS EXPLORATION & DEVELOPMENT, INC., a New Mexico Corporation,
Defendant-Appellee.

ORDER

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges.

Filed December 13, 1972

This matter comes on for consideration of the petition for rehearing filed by the appellant and the appellee's answer thereto in the above case.

Upon consideration whereof, the petition for rehearing is denied.

APPENDIX D

United States Court of Appeals

No. 72-1297

COLUMBIA STANDARD CORPORATION, a
Nevada Corporation,
Plaintiff-Appellant,

v.

RANCHERS EXPLORATION & DEVELOPMENT,
INC., a New Mexico Corporation,
Defendant-Appellee.

JUDGMENT

Entered September 15, 1972

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

HOWARD K. PHILLIPS, Clerk.
By Helen R. Bartha
Deputy Clerk.

APPENDIX E

UNITED STATES CODE ANNOTATED

TITLE 30

§ 22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.
R.S. § 2319; Feb. 25, 1920, c. 85, § 1, 41 Stat. 437.

§ 23. Length of claims on veins or lodes

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other.
R.S. § 2320.

APPENDIX F

NEW MEXICO STATUTES ANNOTATED 1953

Replacement Volume Nine, Part 1 (Supp. 1960)

63-2-3. Discovery shaft—Requirements.—The locator or locators of any mining claim, located after this act [63-2-1] shall take effect, shall, within ninety [90] days from the date of taking possession of the same, sink a discovery shaft upon such claim, to a depth of at least ten [10] feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit, or open cut upon such claim, to at least ten [10] feet below the surface, exposing mineral in place.

63-2-3.1. Alternates to sinking discovery shafts to establish lode mining claims.—An open cut which shall cut the vein ten [10] feet in length and with face ten [10] feet in height, on the lowest part of such cut, a cross-cut tunnel or a tunnel on the vein ten [10] feet in length which cuts the vein ten [10] feet below the surface measured from the bottom of the tunnel, will hold a lode the same as if a discovery shaft had been sunk.

A locator of a mining claim may, at his option in lieu of a discovery shaft, tunnel or pit, drill or cause to be drilled a hole, for the same purpose, in the manner and subject to the following requirements:

A. The hole shall be one and one-half [1½] inches in diameter, or more;

B. The hole shall not be less than ten [10] feet in depth and shall cut or expose, as indicated by the drill hole, a deposit of valuable mineral sufficient in quantity to justify a reasonably prudent man in expending money and effort in further exploration or development; and

C. In the event more than one [1] hole has been drilled, the discoverer shall designate one [1] hole, drilled in accordance with the provisions of this section, as the discovery hole. The discovery hole shall be marked by a substantial post or other permanent marker, placed within

five [5] feet of the hole. The marker shall be at least thirty [30] inches in height above the ground and shall be inscribed with the name of the claim, the claim owner, the depth of the hole and the date the hole was drilled.

The drilling of a discovery hole shall be made a matter of record by recording an affidavit by the locator in the office of the county clerk within ninety [90] days following the location of the claim as provided in section 63-2-1. The affidavit shall contain the following information:

(1) the date of the discovery hole;

(2) the location of the work within the claim; and

(3) the nature of the mineral discovered.

The rights created by a mining claim are based upon the truth of the statements contained in the written notice and the accompanying affidavits filed in the office of the county clerk. No right of any nature shall vest or be created if a claim or affidavit of record shall contain a false statement or misrepresentation.

An owner of a mining claim located prior to the effective date of this act, who has performed discovery work, may avail himself of the provisions of this section by drilling a discovery hole, filling a discovery cut previously made and making of record the required affidavit.

FILE COPY

FEB 28 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1972

NO. 72-1067

COLUMBIA STANDARD CORPORATION,
Petitioner,

v.

RANCHERS EXPLORATION & DEVELOPMENT CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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February, 1973

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In the Supreme Court of the United States

October Term, 1972

NO. 72-1067

COLUMBIA STANDARD CORPORATION,
Petitioner,

v.

RANCHERS EXPLORATION & DEVELOPMENT CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The opinions below are adequately recited in the Petition.

JURISDICTION

The jurisdictional requisites are adequately recited in the Petition.

QUESTIONS PRESENTED

Respondent Ranchers respectfully submits that the following are the appropriate questions presented:

1. Does a subsequent and rival locator of mining claims under the Mineral Location Act of 1872 who maintains a possessory action have the burden of establishing his superior right to the claims in issue based upon the strength of his own rights and not upon the weakness of his adversary's rights?

2. Is the finding that Respondent Ranchers had made a mineral discovery on some of its claims supported by substantial evidence and not clearly erroneous?

3. Is the finding of Petitioner Columbia's lack of good faith entry on to the claims in issue supported by substantial evidence and not clearly erroneous?

STATUTES INVOLVED

The statutory provisions involved are adequately presented in the Petition

STATEMENT

Respondent Ranchers must controvert Petitioner Columbia's statement of the case since it is materially incomplete and misleading.

First, Federal jurisdiction was predicated upon the diversity of citizenship of the parties under 28 U.S.C. §1332, not §1334.

Second, Petitioner Columbia's contention that Respondent Ranchers failed to establish by either physical evidence or

radiometric probes the presence of any mineral in place in Ranchers' deep discovery drill holes ignores the evidence. Petitioner Columbia's contentions are nothing more than an attempt to reargue conflicting factual issues already argued in the trial court and the Court of Appeals. Respondent Ranchers' evidence at trial included the following:

1. All of Respondent Ranchers' deep discovery drill holes disclosed uranium mineral in place. The mineralization disclosed ranged from barely detectable amounts of uranium to obvious mineralization. (A. 95).

2. Respondent Ranchers' radiometric probes are reliable to establish the presence of uranium minerals in place in the Grants Mining Belt (the location of the claims in issue). (A. 92-93). The method utilized by Respondent Ranchers is the same method utilized by the Atomic Energy Commission to calculate the amount of existing reserves of uranium ore and are relied upon heavily by the mining industry. (A. 88, 110).

3. The presence of the favorable Morrison Formation, known to be productive of uranium in the Grants Mining Belt, is physical evidence of its mineral discovery. (A. 93).

4. There is evidence of a known commercial deposit of uranium ore in close proximity to the claims in issue. (A. 94).

5. The evidence showed the existence of channels or trends which indicate it is "quite likely that the [uranium ore] deposits could extend over into the area of [the claims in issue]." (A. 94).

6. The favorability of the sands, i.e., whether bleached or unbleached, is further physical evidence of Respondent Ranchers' mineral discovery. (A. 94).

Third, Petitioner Columbia's summary of the state of knowledge of its location agent, Carlson, fails to recite significant facts known by him. Not only did Carlson know of Respondent Ranchers' interest in the area since 1967 but Carlson, knowing Respondent Ranchers asserted it held valid claims, also had actually participated in a settlement with Respondent Ranchers that involved the very same claims here in issue. (A. 74, 75, 76, 78). In addition, prior to any location by

Carlson on behalf of his new employer, Petitioner Columbia. Carlson had knowledge of Respondent Ranchers' deep drilling activity and suspected that such deep drilling would result in the discovery of uranium mineralization. (A. 74-75, 77, 81).

Fourth, Petitioner Columbia's summary of the District Court's Memorandum Opinion and Order (App. A, Pet., 11) misinterprets the thrust of that Opinion and Order. Petitioner Columbia apparently views the lower courts' decisions as finally determining Ranchers' rights to possession as against the world. In fact, the decision is nothing more than a determination of the bare possessory rights of the two parties. The District Court did not hold that the land held by Respondent Ranchers was not open to relocation generally. Rather the District Court held that—as between Ranchers and Columbia—Petitioner Columbia could not relocate the claims in question, since its attempted relocation was not made in good faith as the term is used in mining law. The alternative holding of the District Court was that Petitioner Columbia failed to meet its burden of proof to uphold its attempted relocation of the claims in dispute.

REASON FOR DENYING WRIT

Rule 19 of this Court indicates a petition for writ of certiorari will be granted only where there are special and important reasons for granting the same. Petitioner Columbia has urged four separate reasons why this case deserves the exercise of this Court's sound judicial discretion. Respondent Ranchers submits that each of the reasons propounded by Petitioner Columbia is without legal or factual substance.

In essence, the majority of Petitioner Columbia's discussion is a reargument of factual issues decided against it by the trial court which are peculiar to this dispute between these two parties. Petitioner Columbia has ignored the thrust of the trial and appellate court decisions which determined possessory rights between the parties upon a unique factual situation and which did not purport to result in any broad new rule of law affecting the public interest or third parties who do not occupy

a position similar to Petitioner's. Further, Petitioner Columbia fails to acknowledge the facts developed in Respondent Ranchers' favor at the trial court level upon which the District Court based its finding. Although, as in all cases, the dispute is of extreme importance to the two parties, Petitioner Columbia overlooks the Court of Appeal's decision's limited application to situations which do not involve a similar, unique factual situation.

As an aid to this Court's review, Respondent Ranchers' position that the petition should be denied can be summarized as follows:

1. The lower courts' decisions turned on the sufficiency of the evidence concerning factual issues arising from the unique circumstances in which the litigants found themselves at the commencement of the dispute.

2. The purported conflict among decisions of the Courts of Appeals are non-existent.

3. The decisions below, having been based on alternative holdings, are correct even if one of the alternative holdings is incorrect. This court therefore is unlikely to reach any issue of substantial importance.

4. The decisions below are legally correct, supported by well established precedent and are supported by substantial evidence.

I.

RANCHERS HAS MADE A MINERAL DISCOVERY ON THE MAJORITY OF ITS CLAIMS AND THE DECISION OF THE COURT OF APPEALS DOES NOT PERMIT PUBLIC LAND TO BE APPROPRIATED WITHOUT DISCOVERY OF MINERAL IN PLACE.

Petitioner Columbia first argues that Ranchers has failed to make a mineral discovery on any of its claims and that the decision of the Court of Appeals violates one of the most basic principles of mining law: the necessity of a mineral discovery.

Respondent Ranchers agrees that a locator must establish a

mineral discovery before he may appropriate any portion of the public domain. 30 U.S.C. §23. Further, the application of the "prudent person" test of *Chrisman v. Miller,* 197 U.S. 313 (1905), is well accepted.

Petitioner Columbia neglects to recognize or cite the equally important principle that in disputes between rival locators, the technical requirements of mineral discovery are liberally applied, since both claimants are presumably disputing the right to extract the same mineral. *Chrisman v. Miller, supra; Nevada-Pacific Development Corp. v. Gustin,* 226 F.2d 286 (9th Cir. 1955), *cert. denied,* 351 U.S. 930 (1956); 1 AMERICAN LAW OF MINING §4.53 (1972). Finally, it is well established in New Mexico that the evidence of the prior locator must be viewed in its most favorable light. *Winslow v. Burns,* 47 N.M. 29, 132 P.2d 1048 (1943). It is with Petitioner Columbia's application of these principles, or its failure of application, that Respondent Ranchers takes dispute.

In arguing that Respondent Ranchers has failed to make a mineral discovery Petitioner Columbia necessarily argues the disputed factual issues concerning the evidentiary sufficiency of Respondent Ranchers' radiometric probes to establish the presence of uranium mineral in place and satisfy the "prudent person" test. Thus, Petitioner Columbia ignores the rival locator test of mineral discovery, the principle of *Winslow v. Burns, supra,* the evidence of Respondent Ranchers' mineral discovery as indicated by witness Fitch (A. 93-95), and the testimony of their own witnesses (A. 116, 120-124). The factors utilized by Respondent Ranchers to establish its mineral discovery have been repeatedly recognized by several state supreme courts. *Rummell v. Bailey,* 7 Utah 2d 137, 320 P.2d 653 (1958); *Berto v. Wilson,* 74 Nev. 128, 324 P.2d 843 (1958); *Western Standard Uranium Co. v. Thurston,* 355 P.2d 377 (Wyo. 1960).

Petitioner Columbia's contention that the decision of the Court of Appeals contravenes *Adams v. Benedict,* 64 N.M. 234, 327 P.2d 308 (1958), is likewise misplaced. *Adams v. Benedict* states the requirement of mineral discovery to perfect a claim (already a federal requirement) and the further requirement that the mineral discovered be cut or exposed by the discovery work

drill hole under N.M. Stat. Ann. 63-2-3.1. However, *Adams v. Benedict* does not discuss, as asserted by Petitioner Columbia, the effect of a locator's failure to record a discovery work affidavit. The effect of a locator's failure to record a required document was discussed by the New Mexico Supreme Court in *Johnson v. Ryan,* 43 N.M. 127, 86 P.2d 1040 (1939). The holding of that case indicates that as long as the locator has substantially complied with the New Mexico location requirements a forfeiture will not result. Respondent Ranchers established its substantial compliance with N.M. Stat. Ann. §63-2-3.1, since it did everything required by that statute except to meet the technical formality of filing a discovery work affidavit. Petitioner Columbia was in no position to complain of this technical deficiency in view of the knowledge of its locating agent, Carlson, who knew, or at least constructively knew within the meaning of *Johnson v. Ryan, supra,* that Respondent Ranchers' deep drilling had resulted in the disclosure of uranium mineralization in place. State courts have reached analogous results where a locator has failed to file an affidavit under the so-called drill hole law. *E.g., Western Standard Uranium Co. v. Thurston,* 355 P.2d 377 (Wyo. 1960).

Petitioner Columbia's attempt to create a conflict among decisions of the Courts of Appeals is also without merit. The decision of the Court of Appeals below in no way conflicts with the principles enunciated in *Henault Mining Co. v. Tysk,* 419 F.2d 766 (9th Cir. 1969). *Henault Mining Co. v. Tysk* does not purport to discuss what constitutes the discovery of uranium, a mineral which emits gamma ray radiation which is capable of being detected and measured. Nor does the case purport to apply the rival locator test of mineral discovery, since the case involved a dispute among different classes of users of the public domain. *See, Chrisman v. Miller, supra.* As indicated in the Statement of the Case, Respondent Ranchers' mineral discovery is based on at least five evidentiary grounds. Although one ground alone might not be sufficient to establish a mineral discovery, all five in combination certainly meet the tests as developed in the various states. *E.g., Rummell v. Bailey,*

supra; Berto v. Wilson, 74 Nev. 128, 324 P.2d 843 (1958); *Western Standard Uranium Co. v. Thurston,* 355 P.2d 377 (Wyo. 1960).

II.

THE COURT OF APPEALS DID NOT HOLD THAT A MINERAL DISCOVERY ON ONE CLAIM WILL VALIDATE ADJOINING CLAIMS ON WHICH THERE IS NO MINERAL DISCOVERY.

Respondent Ranchers never contended below nor does it now contend that a mineral discovery on one claim will suffice to validate contiguous or adjoining claims. Respondent Ranchers agrees that a mineral discovery on each and every claim is necessary before the claim can be appropriated from the public domain. These principles are consistent with the decision of the Court of Appeals.

Even though the Court of Appeals has upheld Respondent Rancher's rights to possession as superior to Petitioner Columbia's, the Court of Appeals' decision does not hold that Respondent Ranchers has validly appropriated the claims on which Respondent Ranchers has yet to make a mineral discovery. The Court of Appeals and the District Court below merely held that Petitioner Columbia's proof failed to establish which of Respondent Ranchers' mining claims were unperfected or, in the alternative, that the evidence failed to show that Petitioner Columbia had relocated the claims in good faith as required by the mining law. (Since Petitioner Columbia discusses the concept of good faith in its third argument, discussion of the mining concept of good faith will be postponed to Argument III, *infra.*)

It is the well established law of the State of New Mexico and other jurisdictions that in order for a junior locator to succeed in a possessory action brought by it against a prior locator, the junior locator must establish its superior possessory rights. *Adams v. Benedict,* 64 N.M. 234, 327 P.2d 308 (1958); *Rummell*

v. Bailey, 7 Utah 2d 137, 320 P.2d 653, 659 (1958) ("Where a mining claim has been located, it will ordinarily be presumed that the locator complied with the law and made a discovery, and the burden would be upon the [subsequent locator] to affirmatively show there was no such discovery . . ." [footnote omitted]). The New Mexico rule has been further developed to the point where the evidence of the prior locator must be viewed in its most favorable light – in essence there is a presumption in favor of the senior locator. *Winslow v. Burns*, 47 N.M. 29, 132 P.2d 1048 (1943). These principles have received recognition in the federal courts. *Kanab Uranium Corp. v. Consolidated Uranium Mines*, 227 F.2d 434 (10th Cir. 1955). The decisions of the Court of Appeals and the District Court below necessarily reflected that at trial counsel for Respondent Ranchers maintained (A. 57, 64, 102-103) and it was stipulated (A. 59) that the maps and overlays admitted as evidence were not true survey representations of the area in issue. In fact, there was evidence that Petitioner Columbia's claims were misdescribed, since it tied its claims to what it thought was the northeast corner of Section 22 but which in fact was the intersection of the north end line of Section 22 and the Canada de Los Alamos Land Grant boundary. (A. 79-80,90). As a result Petitioner Columbia failed to establish which of its claims, if any, did not conflict with Respondent Ranchers' perfected claims. As was stated by the Court of Appeals, Carlson, Petitioner Columbia's location agent, did not testify as to the location of Respondent Ranchers' known deep discovery drill holes on a claim by claim basis. (Ct. App. Op., App. B, Pet., 19). Thus, Petitioner Columbia has simply failed to acknowledge that the lower courts' holdings are based on disputed factual issues and Columbia's failures of proof. Such decisions can hardly be characterized as a departure of the applicable decisions of this Court.

Were Petitioner Columbia's failure to satisfy its burden not enough, the lower courts' alternative holding that Petitioner Columbia failed to establish a good faith entry on the claims in issue justifies dismissal of its claim.

III.
THE DECISION OF THE COURT OF APPEALS DOES NOT ERRONEOUSLY CONCEIVE OR ENLARGE THE GOOD FAITH REQUIREMENT FOR RELOCATION OF DEFECTIVE MINING CLAIMS.

The alternative holding of the Court of Appeals was that Petitioner Columbia failed to establish by its evidence that its entry onto the claims in issue was made in good faith, a concept derived from this Court's holding in *Union Oil Co v. Smith*, 249 U.S. 337 (1919). Consequently, Petitioner Columbia was deemed to have gained no interest in the claims. Petitioner Columbia attempts to portray this alternative holding as being in conflict with the decision of the Ninth Circuit in *Duffield v. San Francisco Chemical Co.*, 205 Fed. 480 (9th Cir. 1913), a sixty year old case which has attracted little or no attention and which does not purport to establish principles governing the factual situation present in this case.

The thrust of Petitioner Columbia's objections to the decision of the Court of Appeals below is its apparent belief that its entry has been tainted with an absence of good faith as a result of its mere knowledge of the existence of Respondent Ranchers' prior claims. Respondent Ranchers did not contend below nor does it now contend that mere knowledge of a prior locator's claims would justify a finding of an absence of good faith entry. Respondent Ranchers agrees to hold otherwise would frustrate the policy of permitting challenges to invalid earlier locations. The District Court's finding of fact that Petitioner Columbia's entry lacked good faith was not based upon Petitioner Columbia's mere knowledge of Respondent Ranchers' prior claims. The evidence upon which the District Court necessarily made its finding and upon which the Court of Appeals upheld such finding as not being clearly erroneous included:

1. The participation of Petitioner Columbia's locating agent, Carlson, in a settlement agreement involving the same

claims as a result of which Carlson knew Respondent Ranchers asserted it held valid claims. (A. 74,75,76,78).

2. Carlson's knowledge of Respondent Ranchers' deep drilling activity which he suspected would result in the discovery of uranium mineralization. (A. 74-75,77,81).

3. Petitioner Columbia's title search for the express, sole purpose of detecting defective titles (A. 77-78).

4. Petitioner Columbia's wholesale relocation of the claims based upon its belief that Ranchers' title was defective (A. 102) without attempting to determine which of Respondent Ranchers' claims had been perfected by deep discovery drilling even though it had knowledge or notice of Ranchers' discovery activities. (A. 65,66,83).

5. Petitioner Columbia's relocation on a weekend. (A. 64,79).

It is thus apparent from the foregoing that the District Court's finding of the absence of good faith entry, upheld by the Court of Appeals as not being clearly erroneous, is based upon other significant facts in addition to Petitioner Columbia's mere knowledge of Respondent Ranchers' prior claims. The significance of good faith entry as developed in this case has been repeatedly recognized by the state supreme courts. *Winslow v. Burns,* 47 N.M. 29, 132 P.2d 1048 (1943) (lack of good faith vitiates any attempt to initiate mining rights); *Johnson v. Ryan,* 43 N.M. 127, 86 P.2d 1040 (1939); *Bagg v. New Jersey Loan Co.,* 88 Ariz. 182, 354 P.2d 40 (1960) (relocation based upon technical deficiencies in the right of prior locator is not in good faith).

Notwithstanding the extent of its knowledge, Petitioner Columbia also argues that it had no duty of inquiry under *Johnson v. Ryan,* 43 N.M. 127, 86 P.2d 1040 (1939), to insure a good faith entry. Petitioner Columbia urges the inquiry requirements of *Johnson v. Ryan* are not applicable to it, since a general duty of inquiry could well frustrate challenges to invalid earlier locations. (Pet., 9). This contention, however, overstates the extent to which the decision of the Court of Appeals placed a duty of inquiry on Petitioner Columbia.

The duty of inquiry imposed by the decision of the Court of Appeals is no more than a duty to make a good faith examination of the ground in issue to determine the extent of a prior locator's location and mineral discovery. If Petitioner Columbia had made such an examination and had relocated only those claims for which it found no evidence of valid location and mineral discovery (instead of its wholesale relocation of all of Ranchers' prior claims), Petitioner Columbia would presumably have satisfied the good faith entry requirement. It is preposterous for Petitioner Columbia to suggest that the duty of inquiry imposed by the Court of Appeals, as outlined above, is onerous or would frustrate challenges to invalid earlier locations.

IV.

THE DECISION OF THE COURT OF APPEALS DOES NOT ENCOURAGE AND PROTECT LARGE AND SPECULATIVE AGGREGATIONS OF PUBLIC DOMAIN WITHOUT EXPLORATION OR DEVELOPMENT.

Petitioner Columbia without expressly setting forth the basis of its assertion predicts that the decision of the Court of Appeals will drastically limit the ability of private locators to contest invalid prior claims and thereby serve the public interest in preventing unlawful uses of the public domain. Respondent Ranchers refutes this assertion basically on the ground that Petitioner Columbia's claim was merely an action for bare possession based upon a particular set of facts which did not require the trial court to make significant determinations of questions of law.

As established above, Respondent Ranchers has made a mineral discovery on the majority of its claims. As a result, under present mining legislation as enacted by Congress, Respondent Ranchers may maintain its interest to those claims in issue as long as it performs the necessary annual assessment

work. As to those claims on which Respondent Ranchers has yet to make a mineral discovery, Petitioner Columbia's failure to prevail is directly attributable to its lack of good faith entry and its failure to meet its burden of proof. The absence of a good faith entry by Petitioner Columbia arose not from its attempted relocation of Respondent Ranchers' unperfected claims but from Petitioner Columbia's reckless overstaking of all Respondent Ranchers' claims without any investigation on the ground to determine whether Respondent Ranchers had any perfected rights therein. To reward attempted relocations of this sort would not further the orderly development of the mineral resources of this country. In addition, Columbia's failure to meet its burden that the land in issue was open to location does not work a disaster upon the orderly development of the mineral resources of this country. This alternative holding of the Court of Appeals was directly attributable to Petitioner's trial tactics of relying almost solely upon Respondent Ranchers' technical failure to record affidavits of discovery work (A. 59,102) which in retrospect proved unsuccessful.

CONCLUSION

For the foregoing reason, Respondent respectfully urges that the petition for a writ of certiorari should be denied.

Respectfully submitted,

POOLE, TINNIN, DANFELSER & MARTIN

Marshall G. Martin
Paull Mines

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